Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

WILFRED R. CARON
General Counsel
U.S. CATHOLIC CONFERENCE
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

MARK E. CHOPKO
Assistant General Counsel
Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Fundamental Right at Stake in This Case Is Not Only of Free Speech, But Also of Free Exercise of Religion. Because the Religion Clauses of the First Amendment Were Intended as Complementary Protections for Personal Religious Liberty, Action Protected under the Free Exercise Clause Cannot Violate the Establishment Clause 6

A. Student-Initiated Voluntary Prayer, Conceded as Appropriate to the Student Activity Period of the High School, Is Protected by the Free Exercise Clause 7

- Prior Relevant Briefs of This Amicus 8

B. The Framers Intended That the Religion Clauses Be Construed and Applied Harmoniously as Complementary Protections of Religious Liberty 9

1. The Establishment Clause Carefully Reflects the Precise Intent and Judgment of the Framers, Based on History and Experience, That There Shoul Be No Governmentally Preferred Religion and That the Government Should Not Interfere in Religious Belief, Practice, or Governance 10

2. The Establishment Clause Was Intended to Buttress the Free Exercise Clause. Applications Which Burden Religious Liberty Are Inconsistent with the Intent of the Framers and Are Necessarily Erroneous 15

TABLE OF CONTENTS—Continued

Page

C. The Principle of "Accommodation" Is the Key to an Establishment Clause Analysis Which Serves Authentic Constitutional Goals 17

II. The Court of Appeals' Application of the Establishment Clause Violated the Free Exercise Clause, Contrary to the History and Purposes of the Religion Clauses. Accommodation of the Student Religious Activity in This Case Promotes Religious Liberty and Is Entirely Consistent with the Establishment Clause 19

A. The Court of Appeals Unnecessarily *and* Erroneously Applied the Three-Part Test to Voluntary Student Religious Activity Protected under the Free Exercise Clause 21

B. The Result Below Is Opposed to the Authentic Values of the Religion Clauses, and to Religion Itself. Accommodation of this Voluntary Student Prayer Group Would Not Violate the Establishment Clause 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

Aguilar v. Felton, jurisdiction postponed, 105 S.Ct. 241 (1984) (Nos. 84-237, 238, 239) 9, 25
Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir. 1984), *cert. granted,* 105 S.Ct. 1167 (1985) (No. 84-773) ..... *passim*
Board of Education of Island Trees v. Pico, 457 U.S. 853 (1982) 25
Bose Corp. v. Consumers' Union, —— U.S. ——, 104 S.Ct. 1949 (1984) 20
Brandon v. Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981) 27
Cantwell v. Connecticut, 310 U.S. 296 (1940) 8, 18, 28
Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir.), *cert. denied,* 454 U.S. 863 (1981) 27
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 2
Empire Life Insurance Co. v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972) 20
Everson v. Board of Education, 330 U.S. 1 (1947) 15
Fowler v. Rhode Island, 345 U.S. 67 (1953) 28
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 8
Hormel v. Helvering, 312 U.S. 552 (1941) 20
Larkin v. Grendel's Den, 459 U.S. 116 (1982) 14
Larson v. Valente, 456 U.S. 228 (1982) 28
Lemon v. Kurtzman, 403 U.S. 602 (1971) 3, 6, 21, 26
Lynch v. Donnelly, —— U.S. ——, 104 S.Ct. 1355 (1984) ..... *passim*
Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983) ..... *passim*
McCollum v. Board of Education, 333 U.S. 203 (1948) 17, 27
McDaniel v. Paty, 435 U.S. 618 (1978) 8, 19, 28
Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062 (1983) 2, 9, 14, 24, 26

TABLE OF AUTHORITIES—Continued

	Page
New Jersey v. T.L.O., —— U.S. ——, 105 S.Ct. 733 (1985)	25
Niemotko v. Maryland, 340 U.S. 268 (1951)	28
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)	20
Reed v. Van Hoven, 237 F. Supp. 48 (W.D.Mi. 1965)	18
School District of Abington Township v. Schempp, 374 U.S. 203 (1963)	15
School District of Grand Rapids v. Ball, cert. granted, 104 S.Ct. 1412 (1984) (No. 83-990)	9
Sherbert v. Verner, 374 U.S. 398 (1963)	4, 19
Speiser v. Randall, 357 U.S. 513 (1958)	28
Terminiello v. Chicago, 337 U.S. 1 (1949)	25
Thomas v. Review Board, 450 U.S. 707 (1980)	7, 8, 18
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)	25
Torcaso v. Watkins, 367 U.S. 488 (1961)	15
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	8
Walz v. Tax Commission of New York, 397 U.S. 664 (1969)	2, 5, 15
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	6, 27
Widmar v. Vincent, 454 U.S. 263 (1982)	7
Wisconsin v. Yoder, 406 U.S. 205 (1972)	4, 9, 15, 18, 19
Witters v. Washington Commission for the Blind, 102 Wash. 2d 624, 689 P.2d 53 (1984), *cert. granted*, 105 S.Ct. 1863 (1985) (No. 84-1070)	29
Zorach v. Clausen, 343 U.S. 306 (1952)	*passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, amend. 1	*passim*
Pub. L. 98-377, 98 *Stat.* 1302 (1984)	27
Northwest Ordinance, Art. III, Ch. VIII, 1789 *Stat.* 50	13, 17
S. Rep. No. 357, 98th Cong., 2d Sess. (1984)	26, 27
S. Rep. No. 376, 32d Cong., 1st Sess. (1853)	14, 15
1 Annals of Congress (Gales & Seaton eds. 1789)	10, 11, 13

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

American Council on Education, *The Function of the Public Schools in Dealing With Religion* (1953) 26
Burger, *Address to the American Bar Association*, 67 A.B.A.J. 290 (1981) 17
J. Choper, *et al. The Supreme Court: Trends and Developments 1982-83* (1984) 28
Comment, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983) 23
Corwin, *The Supreme Court As National School Board*, 14 Law & Contemp. Probs. 3 (1949) 11, 13
Debates on the Adoption of the Federal Constitution (2d ed. J. Elliott ed. 1836) 10
A. Howard, *et al., Church, State, and Politics* (1981) 16
J. Jacobs, *Individual Rights and Institutional Authority: Prisons, Mental Hospitals, Schools and Military* (1978) 25
Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal. L. Rev. 817 (1984) 7, 14
M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* (1978) 11, 13
A. Stokes, *Church and State in the United States* (1950) 9, 13, 15
J. Story, *Commentaries on the Constitution of the United States* (1833) 11, 16
L. Tribe, *American Constitutional Law* (1978) 4, 19
Geo. Washington, Farewell Address (1796), *reprinted in* 131 *Cong. Rec.* S 1372 (Daily ed. Feb. 18, 1985) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-773

MICHAEL BENDER, *et al.*,
Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a non-profit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, pov-

erty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

This case presents an important opportunity to lay down a harmonious construction of the two Religion Clauses. The decision below on Establishment Clause grounds cannot be reconciled with the intent and purposes of both Religion Clauses. Reversal will serve both Clauses by accommodating voluntary student religious groups whose activity otherwise qualifies under criteria set by school authorities for student activity periods.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

This Court's most recent decisions have contributed a new cogency to Establishment Clause jurisprudence, according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. 1355, 1359 (1984); *see Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 3069 (1983). This theme reinforces the suggestion in earlier decisions that "history and experience" form the analytical foundation for the resolution of Establishment Clause issues. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 802 (1973) (Burger, J., concurring and dissenting in part). The framers of the Establishment Clause intended "to state an objective not to write a statute." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).[1] The Clause does not derive its

[1] The first amendment of the Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

meaning through a "legalistic minuet in which precise rules and forms must govern." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Rather, its authentic role is discerned from the process and ideas that forged it. *Lynch v. Donnelly*, 104 S.Ct. at 1359, 1361. The renewed effort to apply the Establishment Clause in accord with its authentic purposes demands of a reviewing court "the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 3337 (1983).

The Williamsport Area School District ("School") permitted regularly-scheduled voluntary student activity. The sole criteria were that the activity "contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." *Bender v. Williamsport Area School District*, 741 F.2d 538, 544 (3d Cir. 1984), *cert. granted*, 105 S.Ct. 1167 (1985) (No. 84-773). At the Williamsport Area High School, a student group called "Petros" was allowed to hold one meeting which about forty-five students attended. They read scripture and prayed. That was their last meeting before this litigation began. On advice of the School's lawyer, these students were excluded from the activity period on Establishment Clause grounds. It is undisputed that their activity met the School's other criteria.

These students were not merely discussing religion. They were engaged in the sharing of scripture and prayer, the classic and undeniable components of religious worship. To regard their activity as mere speech, and then to dispose of their rights *solely* under the rubric of the first amendment guarantee of free speech, is fundamental error which led the court of appeals to imprecise analysis and a wrong result. Clearly, the spectre of a violation of the Establishment Clause in this case demands a recognition that the fundamental right at stake is that specially protected by the other component of the

Religion Clauses, *i.e.*, the Free Exercise Clause. That done, reconciliation of private right and public concern is achieved by the harmonization of these two bulwarks of religious freedom. The requisite constitutional analysis is thus not burdened by a supposed conflict of competing policies rooted in relatively unrelated constitutional provisions (free speech vs. establishment).

The Religion Clauses were intended to be complementary protections for religious liberty. By definition, the free exercise of religion guaranteed under the first amendment promotes religious liberty. *Wisconsin v. Yoder*, 406 U.S. 205, 234, n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. "[I]t seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the framers. . . ." L. Tribe, *American Constitutional Law*, § 14-7, p. 834 (1978). The touchstone for analysis of conduct implicating the Religion Clauses must be whether religious liberty is or may be threatened by governmental action. *See Lynch v. Donnelly*, 104 S.Ct. at 1361. The Establishment Clause was intended to assure that government would never do so.

By prohibiting the Congress from enacting laws "respecting an establishment of religion," the framers intended to restrain the new federal government from interfering in matters of religious belief, practice, or governance, but yet to preserve to the states some measure of freedom to cooperate with churches in matters promoting the common good, and to the people, freedom to express religious and spiritual values. Given these purposes, this Court has stressed that a declaration of unconstitutionality should be made only when, by realistic

measure, the state is clearly and directly involved in religion. *See, e.g., Lynch v. Donnelly, supra; Walz v. Tax Commission*, 397 U.S. at 669. So guided, the government will accommodate religion, but avoid those relationships which threaten to undermine religious liberty by endorsing, preferring, suppressing, or directing a particular religious belief or action. *Zorach v. Clausen*, 343 U.S. 306, 314 (1952).

The Establishment Clause, properly understood in light of its authentic values and illuminating history, is not violated by permitting this student group to meet. What the School District and the court of appeals have disapproved is not a "real threat" to Establishment Clause values, nor even a cognizable "shadow" of a threat. *See Marsh v. Chambers, supra.* Authorizing the use of classroom space for a voluntary student religious group would not impermissibly thrust the state into religious activities, nor communicate the message of official endorsement for a particular religion or religious practice. That it conveys governmental accommodation of religion in general fully accords with the Religion Clauses, and the principle of accommodation established by this Court. *Cf. Zorach v. Clausen, supra.* Where, as here, the action is protected under the Free Exercise Clause, it cannot violate the Establishment Clause.

The majority opinion below followed a course of near-naked hostility toward religion in general, in opposition to the applicable principle of accommodation. The court believed "*any* practice which communicates sanction by the school of religious activity amounts to an Establishment Clause violation." 741 F.2d at 555 (emphasis added). Judge Adams said in dissent, the majority "sanction[ed] a policy singling out a religious group as the only student activity ever to be excluded in the high school's history." *Id.* at 565. The majority based its conclusion not on evidence of a genuine threat to authentic Establishment Clause values, but on specula-

tion regarding "possible perceptions" and a "potential for division." Such vague and unsupported conjecture is fundamentally inconsistent with this Court's admonition that reviewing courts not invalidate action under the Establishment Clause absent evidence of actual infringement of authentic constitutional values. *Marsh v. Chambers, supra.* The result below not only subverts the principle of accommodation rooted in the history and purposes of the Religion Clauses, but could well "teach youth to discount important principles of our Government as mere platitudes." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637 (1943).

ARGUMENT

I

The Fundamental Right at Stake in This Case Is Not Only of Free Speech, But Also of Free Exercise of Religion. Because the Religion Clauses of the First Amendment Were Intended as Complementary Protections for Personal Religious Liberty, Action Protected under the Free Exercise Clause Cannot Violate the Establishment Clause.

This Court's most recent decisions have contributed a new cogency to its Religion Clause jurisprudence, rooting its interpretation of the Establishment Clause in "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly,* 104 S.Ct. at 1359. Thus, the Clause must not be interpreted through a "legalistic minuet in which precise rules and forms must govern" (*Lemon v. Kurtzman, supra*), but rather through fidelity to the process and ideas that forged it. *Lynch v. Donnelly,* 104 S.Ct. at 1359, 1361. Principal among these ideas is that the Establishment Clause complemented the Free Exercise Clause to assure comprehensive protection for religious liberty. An important corollary is that actions protected under the Free Exercise Clause cannot violate the Establishment Clause.

A. Student-Initiated Voluntary Prayer, Conceded as Appropriate to the Student Activity Period of the High School, Is Protected by the Free Exercise Clause.

The majority opinion of the court of appeals acknowledged that this voluntary student group was conducting "activity devoted to prayer." *Bender*, *supra*, 741 F.2d at 541. This reality is at the factual core of the constitutional issue in this case. This group desired to "promote spiritual growth and positive attitudes in the lives of its members;" their first and only meeting prior to this litigation was devoted to a sharing of scripture and prayer. *Id.* at 542-43. Further, the court of appeals also conceded that "religious discussion, religious study, and even prayer, fall within the articulated qualification [for access to the activity period] that student organizations promote the intellectual and social welfare of students. . . . The student members of Petros, therefore, have a valid first amendment interest to engage in their proposed activity." *Id.* at 549-50. Clearly, this case involves constitutionally protected religious activities *appropriate to the forum.*

The court of appeals erroneously limited the "valid first amendment interest" to a "free speech right to engage in religious activity." *Id.* at 559, *see also id.* at 554, 560. This Court has reserved decision on whether devotional exercises of a voluntary student group, appropriate to the forum, are *also* protected by the Free Exercise Clause. *Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1982).[2] "[T]he Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion." *Thomas*

---

[2] As a commentator on Religion Clause decisions has suggested, access cases can reasonably be viewed as implicating free speech, free exercise, and establishment concerns. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal.L.Rev. 817, 820-21 (1984).

v. Review Board, 450 U.S. 707, 713 (1980). The Clause embraces religious speech to which the framers accorded a specific guarantee. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980), *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). "[T]he right to free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality). Similarly, it unquestionably includes prayer, scripture reading, and other acts of devotion and ritual. *See Zorach v. Clausen*, 343 U.S. at 313.

It is true that "free exercise" does not mean "the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Cantwell v. Connecticut*, 310 U.S. at 304, 305. However, when prayer and similar devotion are appropriate to the time and place (*id.*), as is undisputed in this case, the Free Exercise Clause guarantees broad protections which can be displaced only by a substantial showing of a competing and compelling state interest. *Thomas v. Review Board*, 450 U.S. at 718.

The proper resolution of the issues in this case requires consideration of the Free Exercise Clause, particularly in its relationship to the Establishment Clause. Both are so bound up together in their history and purpose that the court of appeal's failure to do so was serious error (discussed at pp. 19-20, *infra*). The discussion that follows demonstrates that the Religion Clauses, harmoniously construed and applied, require reversal of the judgment below.

Prior Relevant Briefs of this Amicus.

This brief is the fourth filed by this *amicus* in the last three terms for the purpose of assisting the Court's analysis and interpretation of the Religion Clauses, in par-

ticular the Establishment Clause.[3] It has presented analysis both of the history of the Clauses, the most detailed being in *Mueller v. Allen*, and of the utility and structure of the *Lemon* three-part test, particularly in *School District of Grand Rapids v. Ball* and *Aguilar v. Felton*, both *sub judice*. Although the discussion which follows is sufficient for the purposes of this case, it may be supplemented by reference to the earlier filings.

B. The Framers Intended That the Religion Clauses Be Construed and Applied Harmoniously as Complementary Protections of Religious Liberty.

The Establishment and Free Exercise Clauses were intended by the framers to be complementary and provide comprehensive protection for religious liberty. "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. The religious freedom guarantees of the Bill of Rights:

> were adopted not as a protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to ensure the continuance and the strengthening of religion, which could not flourish under American conditions if any State Church were either provided for or tolerated.[4]

---

[3] It has filed in *Mueller v. Allen*, 463 U.S. 388 (1983); *School District of Grand Rapids v. Ball, cert. granted*, 104 S.Ct. 1412 (1984) (No. 83-990); and *Aguilar v. Felton, jurisdiction postponed*, 105 S.Ct. 241 (1984) (Nos. 84-237, 238, 239). *Grand Rapids* and *Felton* were argued December 5, 1984.

[4] I A. Stokes, *Church and State in the United States*, 556 (1950).

Both components of the Religion Clauses were meant to work to the same end. If the Establishment Clause component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to bar accommodation of activities which serve the public good and pose no properly cognizable threat to the religious freedom of any person.

1. *The Establishment Clause Carefully Reflects the Precise Intent and Judgment of the Framers, Based on History and Experience, That There Should Be No Governmentally Preferred and That the Government Should Not Interfere in Religious Belief, Practice, or Governance.*

The meaning and precise objectives of the Establishment Clause clearly emerge when its terms are considered in light of history, in particular the legislative drafting process. The prohibition of an establishment or preference of one or more religions by the new federal government was the specific concern of four of the five States which requested such an amendment when they ratified the Constitution.[5] As expressed by Madison, the sponsor

---

[5] During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia specifically addressed the issue of religious freedom in their ratifying acts. Four states (New Hampshire excepted) also addressed the issue of a prohibition against an established religion, in terms of preferring one religion over others. I Debates on the Adoption of the Federal Constitution 328 (2d ed. J. Elliott ed. 1836) (New York), *id.* 334 (Rhode Island), III *id.* 659 (Virginia), and IV *id.* 244 (North Carolina). However, many, including Madison, believed that religion was not the province of the new government and that further clarification was not needed. III *id.* 330. Madison argued that the religious diversity of the new country made preference politically untenable. *Id. See generally* 1 *Annals of Congress* 731 (Gales & Seaton eds. 1789).

in the House, the "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 730 (Gales & Seaton eds. 1789). He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and establish a national religion." *Id.*[6]

There was no tension or doubt related to these objectives, but the choice of words to achieve them did engender certain anxieties born of other concerns. Thus a reference to "national" religion contained in an earlier draft of the Establishment Clause (*see infra* note 9) evoked fears of an implication that the new government would be "national" and not "federal." [7] More important for present purposes was the concern that the new government might interfere with the autonomy of the states in religious matters, a point of particular interest to those states which approved a particular religion to one degree or another.[8] The Religion Clauses that emerged from this

---

[6] *See also* 1 *Annals, supra* note 5, at 432-36. Madison also stated a popular fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731.

[7] Comments during debates, *id.* at 731. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause. *See* Corwin, *The Supreme Court As National School Board,* 14 Law and Contempt. Probs. 3, 10 (1949); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment,* 7 (1978); III J. Story, *Commentaries on the Constitution of the United States,* 731 (1833).

[8] Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from the states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another.

process were a House-Senate compromise.[9] The language finally selected satisfied the major objectives of the recommending states as noted by Madison (text accompanying

---

[9]

HOUSE LANGUAGE	SENATE LANGUAGE
Madison's Proposal—June 8 The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.	September 3 Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.
Select Committee—July 18 No religion shall be established by law, nor shall the equal rights of conscience be infringed.	Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.
Livermore's Language—August 15 Congress shall make no laws touching religion, or infringing the rights of conscience.	Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
Ames Language—August 20 Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.	Congress shall make no law establishing religion or prohibiting the free exercise thereof.
Final Text—August 24 Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.	Final Text—September 9 Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . . .

COMPROMISE

Congress shall make no law
respecting an establishment of religion,
or prohibiting the free
exercise thereof . . . .

note 6, *supra*), but respected the other concerns of his peers.

The phrase "respecting an establishment" had two purposes, first to prevent Congress from establishing or favoring a national religion, and second to prevent Congress from interfering with a state's policies with regard to religion.[10] The phrase "respecting an establishment" cannot reasonably be read to mean merely concerning or touching upon religion. Indeed, that was the terminology proposal by Livermore which was eventually rejected by the House.[11] The word "establish" was *consistently* used to refer to federally-preferred religion in the amendments recommended by the states, by Madison in the House debates, and in versions of the measure in both House and Senate. Notes 5, 6, and 9, *supra*.

There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to suggest less than "an establishment of religion." The language of the Clause does not concern itself with religion in general, but with the particular problem of an establishment of *a* religion. There was no concern expressed during the House debates that Congress might enact a law beneficial to religion or religious institutions. 1 *Annals of Congress*, *supra* at 730-31.[12] Had this been

---

[10] 1 *Annals*, *supra* note 5, at 730-31; *see* Corwin, *supra* note 7, at 11. "Respecting an establishment" meant more than the act of preference but a restraint on Congress' control over practices and beliefs. I Stokes, *supra* note 4, at 539-40. As noted Congress was prohibited from passing laws affecting state establishments. Malbin, *supra* note 7, at 16.

[11] Note 9, *supra*. Although Livermore's proposal passed on August 15, 1789 without any recorded debate, it was not the language eventually adopted by the House. 1 *Annals*, *supra* note 5, at 731, 765, 778.

[12] In *Marsh v. Chambers*, this Court reviewed actions of the First Congress which were beneficial to religion. 103 S.Ct. 3330, 3333 (Chaplains), 3334 n.9 (Thanksgiving Holiday) (1983). *See also* Northwest Ordinance, Art. III, Ch. VIII, 1789 *Stat.* 50, 53.

the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion", without introducing the more limited concept of "an establishment of religion." *See* note 9, *supra*. As already noted, that approach suggested by Livermore was rejected.

The drafting process reflected the framers' experience with the historical realities of church-state entanglement. About half a century later, the Senate Judiciary Committee adverted to that experience when it rejected a citizen's petition urging that provisions for legislative and military chaplains should be abolished as an "establishment of religion." In its Report in 1853, the Committee explained that " 'establishment of religion' . . . referred, without doubt, to that establishment which existed in the mother country." S. Rep. No. 376, 32d Cong., 1st Sess. 1 (1853). It meant:

> the connexion[sic] with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances.

Id. This description provides a strong summary and important interpretation of the historical church-state involvement which led to the Establishment Clause. This description strikingly parallels that found in recent decisions such as *Lynch v. Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring) and *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982).[13]

---

[13] *See Johnson*, 72 Cal.L.Rev. *supra* note 2, at 817 and n. 2. Recently this Court has given renewed importance to the implications of colonial history as reflected in the generative process that forged the Religion Clauses. Johnson, *supra*. *See Lynch v. Donnelly*, 104 S.Ct. 1355 (1984); *Marsh v. Chambers*, *supra*; *Mueller v. Allen*, 103 S.Ct. 3062 (1983).

2. ***The Establishment Clause Was Intended to Buttress the Free Exercise Clause. Applications Which Burden Religious Liberty Are Inconsistent with the Intent of the Framers and Are Necessarily Erroneous.***

As part of the Bill of Rights, the Establishment Clause was intended to safeguard individual liberty. *See Wisconsin v. Yoder*, 406 U.S. at 214. The same is true under the fourteenth amendment which applied the Establishment Clause to the states. *See Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). As detailed above, the Clause reflects the experience of its framers that officially preferred or established religion generates religious intolerance and infringes upon personal liberty. *E.g.*, *School District of Abington Township v. Schempp*, 374 U.S. 203, 221-22 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. *See, e.g., Lynch v. Donnelly*, 104 S.Ct. at 1364.

Although the Religion Clauses enjoin the government to be neutral in relationships among sects, the two Religion Clauses require a benevolent neutrality which (a) accommodates the spiritual needs of the people (Free Exercise) but also (b) avoids official preference or support for particular religions (Establishment). *See Walz v. Tax Commission*, 397 U.S. at 669. As much as the framers were "utterly opposed to any constraint upon the rights of conscience," they "had no fear or jealously of religion itself, nor did they wish to see us an irreligious people. . . ." S. Rep. No. 376, *supra* at 4.[14] Justice Goldberg echoed this attitude in his concurring opinion in *Schempp*, *supra*, 374 U.S. at 305:

> Neither government nor this Court can or should ignore the significance of the fact that a vast por-

---

[14] *See also* I Stokes, *supra* note 4.

> tion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.

In his *Commentaries*, Justice Story emphasized that the framers plainly believed that religion and morality are intimately connected with the well-being of the state and are essential to the administration of civil justice.[15] In addition, Justice Story expressed the view that "universal approbation" would have met any attempt by the government to "level all religions" and hold all in similar indifference.[16]

The framers of our Constitution plainly believed that religion, morality, and ethics are an important part of the core education for new citizens. In his Farewell Address, President Washington indicated that "religion and morality are indispensable supports" for political prosperity. Washington's Farewell Address, *reprinted in* 131 Cong. Rec. S. 1372 (Daily Ed. Feb. 18, 1985). "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience forbid us to expect national morality can prevail in exclusion of religious principles." *Id.* Likewise, although Jefferson used the "wall of separation" metaphor, he often avowed that religious training was a necessary prerequisite for the formation of the democratic citizen. A. Howard, et al., *Church, State, and Politics*, 78-80 (1981).[17] As Rector of the University of Virginia,

---

[15] III Story, *supra* note 7, at 722-23. *See Zorach v. Clausen*, 343 U.S. 306, 312 (1952).

[16] III Story, *supra* note 7, at 726.

[17] The need for education in values, morality, and civic virtue in the schools is echoed still today by, among others, Chief Justice

Jefferson requested and received approval for various religions to establish schools of theology on the public university campus. *See McCollum v. Board of Education*, 333 U.S. 203, 245-46 and nn. 11-13 (1948) (Reed, J., dissenting) (quoting extensively from Jefferson's writings on this point). In the First Congress many actions, including the support for religion in education incorporated into the Northwest Ordinance, mark the dedication of the framers to the importance of religious values in government (*supra* note 12).

C. The Principle of "Accommodation" Is the Key to an Establishment Clause Analysis Which Serves Authentic Constitutional Goals.

These and many other writings and actions of the framers compel the conclusion that the Constitution "affirmatively mandates accommodation, not mere tolerance, of all religions and forbids hostility to any." *Lynch v. Donnelly*, 104 S.Ct. at 1359. There is no requirement that the Government "throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clausen*, 343 U.S. at 314. In fact, in *Zorach*, *id.* at 313-14, Justice Douglas succinctly stated the principles which should guide decision in this case:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee a freedom to worship as one chooses. We make room for a wide variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious

---

Burger. *See* Burger, *Address to the American Bar Association*, 67 A.B.A.J. 290, 291 (1981). The Williamsport student group attempted to provide that kind of discussion of values that Chief Justice Burger has addressed as an element missing in our American school system.

> instruction or cooperates with religions by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their needs. To hold that it may not would be to find in the Constitution a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

As this Court more recently noted, when official actions happen to correspond with religion, it does not "establish" religion, but "is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh v. Chambers*, 103 S.Ct. at 3335, 3336. Accommodation neither implicates nor violates the Establishment Clause, but works to further the aims for which *both* the Establishment Clause and the Free Exercise Clause were intended, namely, the preservation of religious liberty and the encouragement of the rights of conscience.[18]

So too, in furtherance of these aims, the Free Exercise Clause protects broadly the liberty to engage in such devotions or other forms of worship that a person may choose. *See Cantwell v. Connecticut*, 310 U.S. at 303. Religious activity, appropriate to the time and place and not at odds with the liberty of another, may not be displaced unless there is a countervailing and compelling governmental interest to be served. *Thomas v. Review Board, supra*; *Wisconsin v. Yoder*, 406 U.S. at 215. A

---

[18] In *Reed v. Van Hoven*, the District Court examined this Court's teachings on prayer in public schools and negotiated an accommodation for voluntary student prayer in the public schools. 237 F. Supp. 48 (W. D. Mi. 1965). The court believed that the students should be allowed to read and pray scriptures, so long as there was no compulsion. *Id.* at 54-57. In particular, the District Judge recommended to the students that they read the writings of presidents and other documents of American history for their explication of religious teachings and values.

fear that accommodation of religious activity would violate the Establishment Clause has been rejected as a compelling rationale for, among other things, denial of unemployment assistance [*Sherbert v. Verner*, 374 U.S. at 409], compulsory school attendance [*Wisconsin v. Yoder*, 406 U.S. at 220-21], and disqualification of clergy from public office [*McDaniel v. Paty*, 435 U.S. at 626 (plurality) and at 638-39 (Brennan, J., concurring)].

As one contemporary commentator of note has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the framers." Tribe, *American Constitutional Law*, *supra*. A construction of the Religion Clauses which subordinated the Free Exercise Clause to the Establishment Clause would ignore the generative history of the Clauses. More than that, given their joint placement in the first phrase of the Bill of Rights, it would be a logical absurdity and an abuse of basic principle.

II

The Court of Appeals' Application of the Establishment Clause Violated the Free Exercise Clause, Contrary to the History and Purposes of the Religion Clauses. Accommodation of the Student Religious Activity in This Case Promotes Religious Liberty and Is Entirely Consistent with the Establishment Clause.

The court of appeals was sorely pressed to give cogency to its Establishment Clause analysis. *Bender*, *supra*, 741 F.2d at 559-60. In significant part, this resulted from its failure to consider the Free Exercise Clause, to harmonize that Clause with the Establishment Clause, and to analyze the latter according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 104 S.Ct. at 1359.

A "free exercise" claim was made by the students in the district court, but not on appeal. The court of appeals was aware of that. 741 F.2d at 541, n.1. It also sensed its responsibility to conduct an "independent ap-

pellate review" of the record, *id.* at 542, n.3, and is presumed to have known that an appellate court has the further duty to apply the "*correct* law" to the record and "pass upon issues not pressed before it or raised below when the ends of justice will be best served by doing so." *Empire Life Insurance Co. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972), *citing Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941).[19] Indeed, cases implicating first amendment guarantees demand particular scrutiny to assure that those rights are not infringed. *Bose Corp. v. Consumers' Union*, —— U.S. ——, 104 S.Ct. 1949, 1958, 1964, 1965 (1984). Yet, the court of appeals failed to consider the Free Exercise Clause as the primary source of what it described as the "valid first amendment interest" of this voluntary student prayer group.

In this relative analytical vacuum, the majority reached an erroneous result, moved by a few amorphous insights and sheer conjecture. It felt that to permit the students to meet, even without active support from the School, nevertheless "creates the perception among school children that the State has approved a religious activity and thus has placed its imprimatur on religion." 741 F.2d at 555. On that basis, and with no satisfactory explanation of the perceived dangers, the court decided that merely to allow those students the use of a classroom, and to engage a monitor to check attendance, would have the "primary effect" of advancing religion, and would "excessively entangle" the state with religion in violation of the Establishment Clause. *E.g.*, *id.* at 558. Finally, and most distressing, the court also believed that "once activity is found to be religious . . . , then the potential for divisiveness and sectarian dispute is raised, no matter how accommodating the actual practice may be." *Id.* at 554.

---

[19] *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n. 12 (1981) (narrowness of issues in *certiorari* petition not a bar to resolution of "those questions . . . necessary for proper resolution of the case").

Those conclusions are substantially flawed and clearly erroneous in terms of legitimate constitutional analysis based on the authentic purposes of the Religion Clauses.

A. The Court of Appeals Unnecessarily *and* Erroneously Applied the Three-Part Test to Activity Protected under the Free Exercise Clause.

Because this Court has refused "to be confined to any single test or criterion in this sensitive area," the court of appeals should have assessed if the "three-part" test [20] is "relevant" to judging whether the Establishment Clause is violated in this case. *Lynch v. Donnelly*, 104 S.Ct. at 1362. Further, once it decided to apply that test, the court was obliged to do so in a principled way, consistent with history and experience. *See id.* at 1359. And finally, it was duty-bound not to suppress the "valid first amendment interest" of those students because of a "mere shadow" of constitutional concern, but only if a "real threat" to authentic constitutional values were established by the record. *Marsh v. Chambers*, 103 S.Ct. at 3337.

The voluntary student activity in this case is protected under the Free Exercise Clause as religious activity conceded to be appropriate to the school's activity period (discussed at pp. 7-8, *supra*). Properly harmonized with the Free Exercise Clause, in accord with the authentic purposes of the Religion Clauses, the Establishment Clause may not be applied to subvert legitimate Free Exercise rights (discussed at pp. 15, 17-19, *supra*). If the majority below had recognized the Free Exercise implications of the student activity and the interrelation-

---

[20] This Court has applied a three-part test to determine whether the Establishment Clause is violated, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In order to be sustained, first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one which neither advances nor inhibits religion; and third, the statute must not foster excessive government entanglement with religion.

ship of the two Religion Clauses, recourse to the three-part test would not have been necessary. Rather, it would have judged the instant case to be like *Marsh v. Chambers* in which this Court did not employ the three-part test, but, guided by the dictates of history and experience, held that legislative chaplains are part of the fabric of our constitutional history and entirely consistent with the Establishment Clause.

Even if it were appropriate to employ the three-part test, the court below had the duty to do so in a principled manner, based on the evidence and not on supposition and speculation. Like other courts which have proceeded to decision without the requisite guidance from history,[21] the majority below foundered in its Establishment Clause analysis. The purpose of the three-part test is to aid courts in evaluating "legislation or official conduct to determine whether, *in reality*, it establishes *a* religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 104 S.Ct. at 1361 (emphasis added). The court of appeals' conclusions that both the "primary effect" and "excessive entanglement" criteria were violated were not tied to evidence of a threat to authentic Establishment Clause values.

As for the "primary effect" component of the three-part test, the majority believed that "*any* practice which communicates sanction by the school of religious activity amounts to an Establishment Clause violation." 741 F.2d

---

[21] For example, this Court in *Lynch v. Donnelly* and *Marsh v. Chambers* reversed determinations by the courts of appeals made without adequate consideration of the relevant history and experience embodied in the Establishment Clause. This *amicus* has devoted much effort in support of the interpretation of the Establishment Clause consistent with its historical roots. See text *supra* at. . . . The instant case is yet another where the three-part test was invoked to invalidate conduct on the basis of *speculation* of a *perceived* threat to the Constitution. Such applications trivialize the analysis and overlook this Court's efforts to clarify the Religion Clauses according to what history teaches are their authentic purposes. *See Lynch v. Donnelly*, 104 S.Ct. at 1359.

at 555 (emphasis added). The ostensible factual basis for this conclusion was "a possible perception by adolescent students that government is communicating a message of endorsement of religion." *Id.* at 552. This starkly hostile view of religion violates the spirit and letter of the Religion Clauses and the principle of accommodation. *Lynch v. Donnelly*, 104 S.Ct. at 1359. It alters the Establishment Clause from a proscription of sectarian preference to a proscription of accommodation of religion generally.

The majority feared that accommodation would be misperceived by the students as a state imprimatur on religion. This was expressed as concern that high school students would be susceptible to indoctrination by subtle "religious" pressures. This conclusion is not only unsupported by reason and experience, but also refuted by the materials cited by the majority. Thus, research discussed in the *Yale Law Journal* about religious speech public schools indicates that young people are quite capable of understanding and distinguishing that which is officially sanctioned from that which is not. Comment, *The Constitutional Dimensions of Student-Initiated Religion Activity in Public High Schools*, 92 Yale L.J. 499, 507-09 (1983), *cited* 741 F.2d at 554, n.23. As Judge Adams said in dissent below, *id.* at 565 (footnotes omitted):

> To be sure, broad generalizations about the maturity of high school students should not be erected as constitutional principle. But where, as here, the school has officially recognized that its students are sufficiently mature to benefit from two 30-minute periods per week committed to student-initiated activities, and where the school's evaluation of its students' maturity is borne out by their independent decisions to participate in a wide range of activities, a court may properly conclude that at least these students are capable of distinguishing the creation of a student forum from approval of the ideas expressed at any particular meetings. In the words

> of *Widmar*, I "doubt students could draw any *reasonable* inference of [school] support from the mere fact of a campus meeting place." 454 U.S. at 274 n. 14, 102 S.Ct. at 276.

As for the "entanglement" component of the "three-part" test, the majority was concerned that the presence of monitors would place it "in a position of governance over religious activity." 741 F.2d at 556. According to the court, "governance" would consist of the presence of a monitor to keep attendance and order and perform incidental tasks to assure "no religiously oriented material was posted on the bulletin board, published in the school newspaper, or announced over the public address system." *Id.* at 556. These actions do not remotely approach the threshold of unconstitutionality. This Court has approved attendance checks by teachers, including a report by a religious official, as a permissible accommodation under the Establishment Clause. *Zorach v. Clausen*, 343 U.S. at 313. Further, if the student activity itself is constitutionally protected and appropriate, bulletin board announcements and the like could hardly be independently objectionable.

Finally, as for the divisiveness aspect of the "excessive entanglement" criterion, this Court has stated that divisiveness does not serve an analytical purpose except in a case involving public aid to private schools. *Mueller v. Allen*, 103 S.Ct. at 3071, n.11. Yet, the court of appeals thought that the presence of religious activity "would promote an impermissible atmosphere of religious partisanship in a public secondary school which the Establishment Clause requires must be free of such divisiveness." 741 F.2d at 560, 561. In point of fact, the court's conclusions are aimed at *all* religious student activity, not governmental preferment. Further, absent evidence of division or disruption,[22] it is the court, not the student

---

[22] Division and disruption of institutions is often cited as a basis for some limitations on constitutional rights. The character of

activity, that raises the spectre of division and partisanship from action otherwise protected under the Free Exercise Clause. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508-09 (1969), this Court stressed that protected speech may not be restrained absent a showing that it will substantially disrupt order:

> Any word spoken, in class, in the lunch room, or on campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk [*citing, Terminiello v. Chicago*;[23]] and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

See Board of Education of Island Trees v. Pico, 457 U.S. 853, 868 (1982) (plurality). Soo too should this apply to religious expression.

It is interesting that the court of appeals considered "divisiveness" also in connection with the "primary effect" component of the three-part test. 741 F.2d at 554-55. Not only is that application foreign to the rationale of the cases decided by this Court, but it illustrates what this *amicus* has questioned in prior briefs (discussed at pp. 8-9, *supra*), particularly in *Aguilar v. Felton*, *supra:* Should the three-part test yield to a two-part "purpose and effect" analysis rooted in the authentic history and purposes of the Religion Clauses? This

---

public schools as "public institutions" affects the way in which courts, including this Court, deal with claims that constitutional rights are being infringed. J. Jacobs, *Individual Rights and Institutional Authority: Prisons, Mental Hospitals, Schools and Military*, xxi-xxiii, 1-2 (1978). A limitation is sustained only when the exercise of a right is incompatible with the order and discipline of the institution. *E.g., New Jersey v. T.L.O.*, —— U.S. ——, 105 S.Ct. 733, 742-43 (1985) (discussing range of disruptive actions in schools).

[23] 337 U.S. 1 (1949).

amicus respectfully suggests that an affirmative response by the Court would be an important jurisprudential step in aid of the adjudicatory process in Establishment Clause cases.

The court of appeals unnecessarily, and erroneously, applied the three-part test enunciated in *Lemon v. Kurtzman, supra* note 20, as applied and refined in recent cases such as *Lynch v. Donnelly, supra* and *Mueller v. Allen, supra.*

B. The Result Below Is Opposed to the Authentic Values of the Religion Clauses, and to Religion Itself. Accommodation of this Voluntary Student Prayer Group Would Not Violate the Establishment Clause.

To accommodate this student prayer group would imply no official sanction of religion which the Establishment Clause was meant to prohibit. The decision below takes the issue beyond a "wall of separation" and erects, instead, a barrier of hostility to religion. It proclaims a rule of intolerance, namely, that religious expression, however voluntary, orderly or otherwise appropriate it may be, has no place in a public high school. This is an especially dangerous precedent because it withdraws religious values from the educational process at a time when values are formed and conscience is molded. *See* note 17, *supra.*

> [T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.

American Council on Education, *The Function of the Public Schools in Dealing With Religion*, 6 (1953). *See* S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984). The majority's view is fundamentally inconsistent with our history and constitution. Suppression of these delicate

fundamental rights could well "teach youth to discount important principles of our Government as mere platitudes." *West Virginia Board of Education v. Barnette*, *supra*.

In *Zorach v. Clausen*, 343 U.S. at 313-14, this Court settled the principles which govern here: The Religion Clauses guarantee the freedom to worship, a freedom which extends to religious discussion and instruction; the state may encourage and cooperate in those actions as an accommodation permitted under the Clauses, in deference to the spiritual needs of the people. When it does so, it does not establish or prefer a religion in violation of the authentic purpose of the Establishment Clause.

Contrary to the view of the majority below (741 F.2d at 553), this case is not like *McCollum v. Board of Education*, 333 U.S. at 209-10, where the school was affirmatively involved in facilitating formal sectarian instruction during the school day. Here, the student activity is non-denominational and entirely voluntary. Neither is the instant case like others involving student groups which demanded a special meeting space to pray in the absence of a general program of student activity. *See Collins v. Chandler Unified School District*, 644 F.2d 759, 762-63 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981); *Brandon v. Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Here, the School provided an open period for activities which promote the intellectual and social development of students, a criterion which this student group indisputably satisfied.[24] 741 F.2d at 549.

---

[24] Last year President Reagan signed into law a bill requiring that, as a condition of receiving federal aid, school districts with activity periods open to student groups not deny equal access to voluntary student groups like Petros. Pub. L. 98-377, 98 *Stat.* 1302, §§ 801-805 (1984). In that legislation, Congress addressed what it perceived was official hostility (or at least trepidation) toward religion. S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984). The actions rejected by the court of appeals here would plainly be among those the Congress believes should be accommodated.

Prayer and similar devotional student activity *appropriate to the forum* is protected by the Free Exercise Clause and must therefore be accommodated under the Religion Clauses. In cases like *Cantwell v. Connecticut, supra*; *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); and *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); this Court held the Free Exercise Clause protected religious activity against exclusion from a place open to other similar activities.[25] Although public high schools are not precisely in the category of the parks and streets in the cited cases, like that of the religious groups in those cases, the activity of the students here was appropriate to the forum. Thus, the principle of those cases clearly enjoins the School to admit this student group to a forum in which its activity is otherwise concededly appropriate. *See* 741 F.2d at 549. Religion itself may not be sole criterion for denial of access to a publicly-allocated benefit. *See McDaniel v. Paty, supra.*[26] As Judge Adams

---

[25] The discriminatory denial of the use of parks to religious groups abridged both the exercise of religious liberty and free speech as applied to the states under the Equal Protection Clause. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951). Any doubt about the first amendment underpinning of these decisions is resolved by Justice Frankfurter's concurrence in *Fowler, supra*, and in *Niemotko v. Maryland*, 340 U.S. at 284, in which he specifically declined to join the Court's opinions on any rationale other than Equal Protection. That *Larson v. Valente*, 456 U.S. 228 (1982), disposed of similar discrimination on Establishment Clause grounds does not show any infirmity in the constitutional doctrine of these earlier cases, but simply that both Clauses work together to preserve religious liberty.

[26] *McDaniel v. Paty*, 435 U.S. 618 (1978), is but one example of government action that violates the Free Exercise Clause by singling out religion for adverse treatment. J. Choper, *et al.*, *The Supreme Court: Trends and Developments 1982-83*, at 72-73 (1984). *Cf. Speiser v. Randall*, 357 U.S. 513, 518 (1958) (denial of tax exemption for engaging in certain speech penalizes free speech and is therefore constitutionally forbidden). Recently, the same kind of excess characterized the Washington Supreme Court's denial of equally available student aid based on the student's religious pro-

said in dissent, the majority "sanction[ed] a policy singling out a religious group as the only student activity ever to be excluded in the high school's history." 741 F.2d at 565. Accommodation, not hostility, should have marked the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

WILFRED R. CARON
General Counsel
U.S. CATHOLIC CONFERENCE
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

MARK E. CHOPKO
Assistant General Counsel
Of Counsel

---

gram of instruction. *See Witters v. Washington Commission for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984), *cert. granted*, 105 S.Ct. 1863 (1985) (No. 84-1070).